IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-498

JUPITER INLET CORPORATION,

Petitioner

vs.

THE VILLAGE OF TEQUESTA, ET AL.,

Respondents

AMICUS CURIAE
BRIEF [redacted] TO

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF FLORIDA

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INDEX

CASES

STATUTES

APPENDIX

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RESPONDENTS BRIEF IN OPPOSITION

The Respondent, Pinellas County, Florida, a Political Subdivision of the State of Florida, respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the opinion of the Supreme Court of the State of Florida.

JURISDICTION

Petitioners seek to invoke jurisdiction under 28 USC Section 1257(3). The Petitioners claim that their rights, privileges and immunities under the United States Constitution were claimed in the proceedings below and are being effectively denied. However, a review of the facts and circumstances of the case as set forth in the Petition for Certiorari will reveal several impediments to review by this Court. As will appear more fully under "Reasons for Denying the Writ" infra, this Court is without jurisdiction to review the decision of the Florida Supreme Court in this case.

QUESTIONS PRESENTED BY PETITIONER

1. Whether Petitioner has a protectable property interest within the meaning of the Florida and United States Constitutions in its right to use the shallow water aquifer lying beneath its land.

2. Whether Respondents withdrawal of fresh water from the shallow aquifer including water underlying Petitioners land constitutes a taking of Petitioners property within the meaning of the Florida and United States Constitutions.

3. Whether this Court should disregard the Florida Supreme Court's determination that Petitioner had no protectable interest in the ground water aquifer.

STATEMENT OF THE CASE

In this Brief, Pinellas County, a Political Subdivision of the State of Florida, will be referred to as "Pinellas County". Petitioner, Jupiter Inlet Corporation, will be referred to as "Petitioner" or "Jupiter". Respondent, the Village of Tequesta, et. al., will be referred to as "Respondent" or "Tequesta". The following symbols will be used:

A—Petitioner's Appendix
B—Petition for Writ of Certiorari filed by Petitioner.
AA—Appendix to Respondents Brief in Opposition to Petition for Writ of Certiorari.

For a number of years, Tequesta has maintained a well field supplying fresh potable water to its inhabitants near Jupiter's property. Prior to the enactment of Chapter 373 Florida Statutes, Florida's Water Resources Act, Tequesta embarked upon a system of water management of various wells in its well field near the Jupiter property.[1]

1. (AA 7-8)

Florida's Water Management Act which was passed in 1972 provides, in part:

> "(1) The governing body or the department may require such permits for consumptive use of water and may impose such reasonable conditions as are necessary to assure that such use is consistent with the overall objectives of the district or department and is not harmful to the water resources of the area. However, no permit shall be required for domestic consumption of water by individual users." F.S. 373.219

* * * * * * * * * * * * * * * * * *

In reality, there are two kinds of uses of water recognized by Part II of Chapter 373, Florida Statutes. They are divided into existing uses and new uses. Cardinal to the question before the Court is F.S. 373.226:

> "373.226 *Existing uses.* — (1) All existing uses of water, unless otherwise exempted from regulation by the provisions of this chapter, may be continued after adoption of this permit system only with a permit issued as provided herein.
>
> (2) The governing board of the department shall issue an initial permit for the continuation of all uses in existence before the effective date of implementation of this part if the existing use is a reasonable-beneficial use as defined in §373.019(5) and is allowable under the common law of this state.
>
> (3) Application for permit under the provisions of subsection (2) must be made within a period of two years from the effective date of implementation of these regulations in an area. Failure to apply within this period shall create a conclusive presumption of abandonment of the use, and the user, if he desires to revive the use, must apply for a permit under the provisions of §373.229."

After the Act was passed Tequesta applied for a permit for the purpose of continuing to draw the potable water from the

shallow well aquifer at its well field No. 4.[2] This permit was granted.[3]

Jupiter then commenced plans to construct a 120-unit condominium project approximately 900 ft. from Tequesta's well field. The permit for construction of the condominium obtained from Palm Beach County contained an express condition that Jupiter seek another water supply other than the shallow well aquifer.[4]

Tequesta applied to the South Florida Water Management District for additional well fields. Jupiter intervened contesting Tequesta's right to obtain additional water supplies and apparently contesting Tequesta's withdrawal of water in its well field near Jupiter's property. Jupiter did not prevail before the Water Management District and filed an action to require Tequesta to condemn the ground water supply in the shallow well aquifer below Jupiter's property.[5]

A HYDROLOGICAL INSIGHT INTO THIS CASE

Jupiter's property is about 900 feet from the Village of Tequesta's wellfield No. 4 and is on a line between the wellfield and the Intracoastal Waterway.[6]

Jupiter applied to the county commission sitting as the zoning board for a permit to construct a water supply facility utilizing a well in the ground water aquifer. The Village of Tequesta objected stating that the proposed well might affect the Village of Tequesta's water supply.[7]

The same ground water aquifer serves both the Village of Tequesta's wellfield No. 4 and Jupiter's property.[8]

2. (A 23)
3. (A 23)
4. (AA 18-19)
5. (AA 1-4)
6. (AA 5)
7. (AA 13-14)
8. (AA 19-20)

Water-bearing zones under the earth's surface capable of receiving, storing, and transmitting water are called aquifers. In Florida, most aquifers are cavernous limestone or sand and shale beds. Aquifers are separated by relatively impervious layers of shales and clays which are called aquicludes. There are two basic types of aquifers. One is the unconfined aquifer associated with the water table. It is free to rise and fall with the amount of rainfall and other surface water influences such as rivers, lakes, irrigation, etc. Near the coast the water level in this aquifer fluctuates with tidal action. It is referred to as the ground water aquifer, water table aquifer and the shallow aquifer. The other type of aquifer is an artesian aquifer. Water in this aquifer is confined by aquicludes. Water will either not pass through these aquicludes or will do so at a much slower rate than it can travel within the aquifer itself. Water enters artesian aquifers slowly through the surrounding aquiclude through fissures, sink holes or other openings in the aquiclude. Water in the artesian aquifer is under pressure. Simply stated, when a well is drilled through the aquiclude into this aquifer, water will rise in the well to a level equivalent to the elevation of the water above the point of entry into the aquifer or equivalent to the pressure the water is under at the point of entry into the aquifer.[9]

In the area of the Village of Tequesta Wellfield No. 4 and Jupiter project, two aquifers are of interest. The ground water aquifer which is replenished by rainfall fluctuates with the amount of rainfall and the amount of withdrawal from wells for consumptive use of water. Because of this area's proximity to the Intracoastal Waterway, the water level in the aquifer is also influenced by tidal action in the waterway. Since fresh water is lighter than salt water, it will "float" in the aquifer on more dense salt water. Either the lack of rainfall or excessive withdrawal can lower the level in the aquifer enought to allow the surrounding salt water to move inward. Therefore, an elevation in the water table above sea level must be maintained to prevent the intrusion of salt water inland to producing wells.

9. Pinellas County's entire Hydrological Statement is supported by the Florida Supreme Court's Opinion in this cause. (A 10-25)

The second aquifer of interest is the artesian aquifer which is under the ground water aquifer and is known as the Floridian Aquifer. The Floridian Aquifer underlies the entire state and furnishes most of the well water supplies of the state; however, this aquifer in the southern and eastern part of the state has an increased level of chlorides which exceed drinking water standards. This water is too salty for use without treatment to remove some of the chlorides.

The Village of Tequesta has made use of water from the ground water aquifer as permitted by the South Florida Water Management District pursuant to Chapter 373 Florida Statutes.

There is evidence of saltwater intrusian in the Village of Tequesta's Wellfield No. 4 from the Intracoastal Waterway caused by regional pumping in the area.[10] Saltwater intrusion is caused by fresh ground water elevations which are lower than necessary to prevent saltwater movement.[11] The USGS[12] recommended maintenance of a fresh water ridge or minimum elevation between Wellfield No. 4 and the Intracoastal Waterway to prevent Saltwater intrusion.[13]

The Village of Tequesta applied for a permit to the Flood Control District for another wellfield, proposing to reduce pumping from Wellfield No. 4 to maintain a one-foot elevation in water table.[14] By this action, the Village of Tequesta responded to good water management techniques and recommendations of the USGS and South Florida Water Management District and secured alternative resources of water to protect existing water users and the water resources in the area. Present withdrawals are already drawing the water table down below minimum elevation needed to prevent saltwater intrusion from the Intracoastal Waterway. Any more withdrawal would aggravate the condition and also require the Village of Tequesta to

10. (AA 5-9)
11. (AA 12)
12. (AA United States Geological Survey)
13. (AA 14-17)
14. (AA 17)

cut back pumping to allow elevations to rise to minimum levels.[15] The withdrawal of 32,000 gallons per day, as requested by Jupiter, would obviously cause saltwater intrusion.[16] Jupiter's zoning was granted upon the condition that Jupiter seek other sources of water than from the ground water aquifer and Tequesta's water supply. Jupiter then applied for and received a State Health Department permit to construct a reverse osmosis water plant to treat water from the Floridian Aquifer.[17]

Since more withdrawal from the ground water aquifer in the area would be harmful to the resources of the area, it was necessary for Jupiter to turn to alternate sources of water for its project. They determined to go deeper with their well to make use of the Floridian Aquifer and use a reverse osmosis treatment plant to remove unacceptable chlorides from the water. Because Jupiter is a new water user, it has had to utilize water under its property in a deeper aquifer because its location near the Intracoastal Waterway is such that withdrawal from the ground water aquifer would damage that aquifer by causing saltwater intrusion. *Maximum reasonable beneficial use of the water in the ground water aquifer is already being used by users in the area permitted by the South Florida Water Management District pursuant to state law.*[18] *Jupiter was aware of these facts when the project was begun. Thus, Jupiter has not been deprived of the use of water from underneath its property. It simply has been required to use water at a deeper level which is not being used by PRIOR APPROPRIATION of Tequesta. There is water available in the shallow well (water table) aquifer, but Jupiter cannot use it, for to do so would increase saltwater intrusion and permanently harm the resource.*[19]

Petitioner, time and again, in its petition for Writ of Certiorari makes the statement that the shallow well aquifer below its property has been "flooded with saltwater" or that the shal-

15. (AA 11-12)
16. (AA 9-10)
17. (AA 18-19)
18. (F.S. 373.226 & F.S. 373.233)
19. (See F.S. 373.042)

low well aquifer is now "useless".[20] *There is no testimony in Petitioner's Appendix supporting this statement.* In fact there is no testimony in the entire record supporting these statements. The testimony adduced reveals that there has been some saltwater intrusion at Tequesta's wellfield No. 4 and that Tequesta has been working with the Water Management District to develop other wells for the purpose of alleviating this situation.[21] The evidence also shows that any additional pumping from this resource would aggravate the condition. *Thus, Jupiter's request for a permit to pump potable water from its shallow well aquifer was denied by the South Florida Water Management District.*[22]

In the Petitioner's statement of the case and in other statements made within its brief it is obvious that Petitioner is seeking to mislead this court into believing that its property has been flooded with saltwater, thus denying the Petitioner of the highest and best use of its property. *This is not the case.* The Petitioner has developed its property to its highest and best use and Petitioner is still able to withdraw fresh potable water from beneath its property. Petitioner has merely been required to drill down to the Floridan aquifer to acquire the water because the hydrological Experts of the South Florida Water Management District have determined that any further use of the Shallow Well Aquifer in that area will cause saltwater intrusion.

The Water Management Districts were established to determine, under the Doctrine of Prior Appropriation, the right of Water Users to withdraw water from the shallow well and deep well (Floridan) aquifers. No longer could a Landowner simply put down a well and pump to his heart's content. He needs to obtain a permit. The waters of Florida have been declared to be vested in the State, not individual Landowners. Under this concept, the South Florida Water Management District has determined that Tequesta has the prior right to use all of the waters

20. (B 4, 13, 14, 15, 20)
21. (AA 17)
22. (A 27)

of the Shallow Well aquifer in the area underneath Jupiter's property.

It must be emphasized that Jupiter has no right to any water in the Shallow Well aquifer *unless* it first obtains a permit for the withdrawal of such water from the Water Management District. Clearly, this is a condition precedent to any action by Jupiter for condemnation or otherwise. Without Jupiter having a right in law to withdraw water, how can it seek relief for loss of a property right?

Pinellas County believes that a thorough analysis of the pertinent sections of Chapters 373 Florida Statutes would assist this court in its determination in this regard. Without a permit or a prior use of water which pre-dated the enactment of the Statute, no owner of land has the right to withdraw water from underneath his property. The scheme of Chapter 373 Fla. Stat. centers around the proving by a Landowner that he is going to put the water, which is withdrawn from the aquifer to a "reasonable beneficial use." This means that he must prove that he will use the quantity of water in such a manner as to demonstrate an economic and efficient utilization of the resource, which is both reasonable and consistent with the public interest. Florida Statute 373.016 provides:

> *Declaration of Policy —*
> (1) The waters in the state are among its basic resources. Such waters have not heretofore been conserved or fully controlled so as to realize their full beneficial use.
>
> (2) It is further declared to be the policy of the legislature:
>
> (a) To provide for the management of water and related land resources;
> (b) To promote the conservation, development, and proper utilization of surface and ground water;
> (c) To develop and regulate dams, impoundments, reservoirs, and other works and to provide water storage for beneficial purposes;
> (d) To prevent damage from floods, soil erosion, and excessive drainage;

(e) To preserve natural resources, fish and wildlife;
(f) To promote recreational development, protect public lands, and assist in maintaining the navigability of rivers and harbors; and
(g) Otherwise to promote the health, safety, and general welfare of the people of this state.

(3) The legislature recognizes that the water resources problems of the state vary from region to region, both in magnitude and complexity. It is therefore the intent of the legislature to vest in the department of natural resources or its successor agency the power and responsibility to accomplish the conservation, protection, management, and control of the waters of the state and with sufficient flexibility and discretion to accomplish these ends through delegation of appropriate powers to the various water management districts. The department may exercise any power herein authorized to be exercised by a water management district; however, to the greatest extent practicable, such power should be delegated to the governing board of a water management district.

Water Management Districts must look at the application of any prospective water user with the view of establishing minimum flows or levels below which withdrawal will cause harm to the resource.[23] If a Permit Applicant is unsatisfied with the ruling of the Water Management District, he may either appeal to the District Court of Appeal which has jurisdiction of the area wherein the Water Management District is located, or he may appeal to the Governor and the Cabinet.[24] In this case Jupiter did neither.

23. (F.S. 373.042)
24. (F.S. 373.114)

SUMMARY OF REASONS FOR DENYING THE WRIT

I. THE COURT LACKS JURISDICTION TO ENTERTAIN THE PETITION FOR WRIT OF CERTIORARI.

The petitioner admits a failure on his part to raise any federal issues prior to the petition for rehearing filed in the Florida Supreme Court. The petition for rehearing was denied and the Florida Courts never considered nor decided any issue involving the Federal Constitution, a Federal Treaty or Federal Statute. *The Florida Court based its decision solely upon Florida Law.*

This Court has held, on numerous occasions, that it is without jurisdiction to review a State Court's ruling unless the Federal ground was a determining factor in the decision of the State Court. Furthermore, where a Federal issue is not raised until petition for rehearing in the State's highest Court and that petition for rehearing is denied, this Court has said that the Federal issue was raised too late in the proceedings, and thus, the United States Supreme Court is without jurisdiction to review the State Court's decision.

Petitioner argues that it failed to raise any Federal issues in this case because it was relying on "established" Florida Law which petitioner claims recognized a property interest in subterranean water rights. Petitioner urges that the Florida Supreme Court radically changed Florida Law in this area in entering its decision in the case at Bar.

The plain and simple truth is that Florida has always followed the "reasonable use" rule in regard to water rights. This is even pointed out in the cases cited in the petition for writ of certiorari by the petitioner. Under this doctrine, there is *no* vested right in water unless and until the water has been reduced to possession and appropriated for a beneficial use.

Florida Statute 373, which is known as the Florida Water

Resources Act, codifies the reasonable use doctrine and appoints the Water Management District to make factual determinations as to reasonable uses, prior uses, and granting or denying of permits.

Petitioner applied for a permit pursuant to the provisions of Florida Statute 373 prior to the institution of this lawsuit. Its application was denied. By applying for a permit, the petitioner exhibited an understanding of Florida Law on this issue. It recognized the fact that it had no right to subterranean water absent a permit to withdraw same.

There was no "unexpected departure" from established state law by the Florida Court in this case. Established state law as expressed in the Florida Constitution, case law, and Florida Statute 373 was the precise foundation upon which the Florida Supreme Court decision was based.

Since the petitioner failed to timely raise any federal issue in this case, this Court is without jurisdiction to grant the petition for writ of certiorari.

II. THE QUESTION OF WHETHER SUBTERRANEAN WATER RIGHTS CONSTITUTE PROPERTY WHICH IS SUBJECT TO CONDEMNATION HAS ALREADY BEEN DECIDED BY THIS COURT.

This Court has upheld cases factually similar to the case at Bar. In *Baumann vs. Smirha*, 145 F.Supp. 617 (D.C. Kan. 1956), the Federal District Court held:

1. A landowner does not have a vested right in underground percolating water underlying his land, which he has not appropriated and put to a beneficial use.

2. A state can pass a Water Management Act utilizing the Doctrine of Prior Appropriation to vest in other landowners the right to continue to use waters withdrawn, even if they are from underneath another's land.

3. Such Water Management Acts do not violate the 14th Amendment to the United States Constitution as taking of property without due process of law.

4. Under such a scheme, the complaining landowner must invoke only the remedies afforded under the Water Management Act.

5. Even though prior decisions of a State Court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a depravation of property without due process of law under the 14th Amendment.

This Court affirmed that decision in *Baumann vs. Smirha*, 352 U.S. 863 (1956).

And in *Cappaert v. United States*, 426 U.S. 270 (1976), in which a presidential proclamation reserved certain land for a federal purpose. This Court held that when the government reserves land for a federal purpose, it, by implication, reserves the pertinent water then *unappropriated* to the extent needed to accomplish the purpose of the reservation. This Court went on to hold that under Nevada law, water rights were created only by appropriation for beneficial use. Since the Cappaerts had not appropriated any water to their use until after the presidential proclamation reserving the land for a federal purpose, they had no vested interest in the water.

Like Nevada, Florida follows the rule of prior appropriation. In the case sub judice, Jupiter never appropriated any water from the shallow well aquifer underneath its land and therefore has no water rights vested therein.

III. THE DECISION OF THE FLORIDA SUPREME COURT IS BASED SOLELY UPON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

This case was decided solely upon state law grounds. The

Florida Supreme Court ruled that petitioner's sole remedy in this case was through proper application for a permit under the Florida Water Resources Act. The petitioner has applied for a permit under the Act and this permit was denied. No appeal was taken by the petitioner.

REASONS FOR DENYING THE WRIT

I. THE COURT LACKS JURISDICTION TO ENTERTAIN THE PETITION FOR WRIT OF CERTIORARI.

The Petitioner has sought a Writ of Certiorari under 28 USC Section 1257(3) which provides:

> "By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States".

Petitioner has admitted that no Federal question was raised in the State Courts until the petition for rehearing was filed by the Petitioner in the Florida Supreme Court. The petition for rehearing was denied by the Florida Supreme Court. That Court *never* ruled on any question involving the Federal Constitution or a treaty or statute of the United States.

In fact, under the Florida Law it would have been improper for the Florida Court to consider any matter which is raised for the first time on a petition for rehearing. *Cartee vs. Florida Department of Health and Rehabilitative Services*, 354 So. 2d 81 (Fla. 1st DCA, 1977), *Kerr vs. Schildiner*, 167 So. 2d 798 (Fla. 3rd DCA, 1964).

This court has, on numerous occasions, held that where a petitioner has failed to raise the Federal question until a petition

for rehearing in the State's highest court, the U.S. Supreme Court is without jurisdiction to review the State Court's decision. *Bilby vs. Stewart*, 246 U.S. 255 (1918), *Ellis vs. Dixon*, 349 U.S. 458 (1955).

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. (Citations omitted). The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb vs. Pitcairn*, 324 U.S. 118 (1945).

And in *Department of Mental Hygiene of California vs. Kirchner*, 380 U.S. 194 (1965), this court held:

"This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case".

* * * * * * * * * * * * * * * * * * *

"An examination of the opinion of the California Supreme Court in the case before us does not indicate whether that court relied on the State Constitution alone, the Federal Constitution alone, or both; and we would have jurisdiction to review *only if the federal ground had been the sole basis for the decision*, or the State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution". (Emphasis supplied by Court)

In the case at Bar, by the petitioner's own admission, the Florida Supreme Court decided the issues involved *solely* upon the laws and constitution of Florida. Therefore, this court is without jurisdiction to grant a Writ of Certiorari.

The Petitioner urges that it failed to raise any Federal ques-

tions in this lawsuit because it was relying on the "definition of property adopted by the Florida state courts prior to the Florida Supreme Court's opinion in this case."[25] The plain and simple fact is that Florida Law, even prior to Florida Statute 373, consistently followed the "reasonable use" rule in regard to water rights. *Koch vs. Wick*, 87 So.2d 47 (Fla. 1956) and *Cason vs. Florida Power Company*, 74 Fla. 1 76 So.535 (Fla. 1917).

This Court will note that even the cases cited by Petitioner in its petition for Writ of Certiorari hold that there is no vested right in water unless and until the water has been reduced to possession and appropriated for a beneficial use. Furthermore, the Petitioner had total knowledge of the passage of Florida Statute 373 and, in fact, applied to the Water Management District for a permit subject to the provisions thereof. The theory of the Petitioner that its subterranean water rights are a property interest which is subject to condemnation is totally inconsistent with this statutory scheme.

The case at Bar is not the first case which has been decided under Florida Statute 373. Other cases which have considered the provisions of this statute and the power which it vests in the Water Management Districts are: *City of St. Petersburg vs. Southwest Florida Water Management District*, 355 So.2d 796 (Fla. 2nd DCA 1977) and *Pinellas County vs. Lake Padgett Pines*, 333 So.2d 472 (Fla. 2nd DCA 1976).

Thus the Petitioner had absolute knowledge that under Florida Law subterranean water rights do not constitute property subject to condemnation. The Petitioner could have raised the Federal constitutional questions at the inception of this lawsuit, however, it chose not to. There was no "unexpected departure" from established State Law. Established State Law as expressed in the Florida Constitution, case law and Florida Statute 373 was the precise basis of the Florida Supreme Court decision. This is made abundantly clear in the summary of the Florida Supreme Court's decision wherein the court states:

25. (B 6)

In summary we hold:

1. Prior to the adoption of the Water Resources Act, Florida followed the reasonable use rule; that is, a landowner, who, in the course of using his own land, removes percolating water to the injury of his neighbor, must be making a reasonable exercise of his proprietary rights, i.e., such an exercise as may be reasonably necessary for some useful or beneficial purpose generally relating to the land in which the waters are found;

2. There was no ownership in the waters below the land, as the right of the owner to ground water underlying his land was to the use of the water and not to the water itself;

3. In applying the reasonable use rule, this Court has not given definite answers as to the actual amount of water that may be taken by overlying landowners.

4. The diversion of water from the shallow-water aquifer is not a "taking" or an appropriation of property for public use requiring condemnation proceeding unless there is a resulting damage to the land itself, for example, a diversion of water to the extent that the land becomes unsuitable for cultivation, raising the level of flowing waters to the extent that land is flooded, etc.;

5. The landowner does not have a constitutionally-protected property right in the water beneath the property, requiring compensation for the taking of the water when used for a public purpose;

6. Just as legislation may limit the use of property for certain purposes by zoning, so it is that the right to the use of the water may also be limited or regulated.

7. The Water Resources Act now controls the use of water and replaces the ad hoc judicial determination in water management districts where consumptive use permitting is in force.

8. Jupiter's remedy is only through proper application for a permit under the Florida Water Resources Act.[26]

26. (A 24-25)

The Florida court recognized the fact that there was *one* case from Florida which made the statement that "Water, oil, minerals, and other substances of value which lie beneath the surface are valuable property rights which cannot be divested without due process of Law and the payment of just compensation." *Valls vs. Arnold Industries, Inc.*, 328 So.2d 471 (Fla. 2nd DCA 1976). The Florida Supreme Court expressly overruled the dicta in the Valls case. The court pointed out that the cases relied upon in the Valls decision did not refer to property rights in water. They referred only to property rights in minerals, gas and oil.

The Florida Court also distinguished the cases which Petitioner cities in his petition for Writ of Certiorari as the "Established" Florida law on the issue of water rights:

> "The cases relied upon by respondent involve situations where there was damage to the land itself, a result which does not exist in this case. *Cason v. Florida Power Co., supra*, dealt with resulting damage to the fee because of the diversion of percolating water. *Koch v. Wick, supra*, dealt with damage to the fee by diversion of water therefrom to the point that the fee would become infertile and unsuitable for cultivation. In *State Road Department, et al. vs. Tharp*, 146 Fla. 745, 1 So.2d 868 (1941), the construction of a highway embankment impeded the flow and raised the level of a millrace to such an extent as to destroy the use of plaintiff's grist mill. This was held to be a taking.
>
> The "reasonable use" rule insofar as the proprietary beneficial use of water is concerned has no application where the court is concerned with the proprietary use of *land*, and in which the water is only incidentally affected. *See Labruzzo vs. Atlantic Dredging and Construction Co., supra.*
>
> Property owners have been successful in seeking relief under the theory of inverse condemnation against the appropriate authority as a result of the excessive noise from low-flying jet aircraft. *See Hillsborough County Aviation Authority vs. Benitez*, 200 So.2d 194 (Fla. 2d DCA 1967). The "taking" of an airspace above the land is not comparable to the "taking" of the water located in a ground aquifer beneath the land in the absence of a trespass on the land itself. The damage to the airspace was such as to deprive the property owners of all beneficial use of their property. *The alleged damage to the shallow-water aquifer deprived Jupiter of no beneficial use of the land itself. Jupiter developed the property to its highest and best use and has suffered no more than consequential damage, which is not compensable through inverse condemnation."*[27] (Emphasis supplied by Respondent).

As is clearly evident from the Florida Supreme Court's decision, it is totally consistent with prior Florida Law. The Florida Law was merely solidified and clarified by this decision from the State's highest court. Thus the "years of established law, history and precedent" to which the Petitioner refers is the *dicta* in *one case* out of the Second District Court of Appeal of Florida.[28]

Even if the Florida case law had been as established as Petitioner would have this Court believe, Petitioner should have raised the Federal questions at the inception of the lawsuit. *This court has held that a person has no property right or vested interest in any rule of common law.* The constitution does not forbid the creation of new rights or the abolition of old ones, despite the fact that otherwise settled expectations may be upset thereby. *Duke Power Company vs. Carolina Environmental Study Group, Inc.*, 98 Supreme Court 2620 (1978), *Second Employers Liability Cases*, 223 U.S. 1 (1911), *Silver vs. Silver*, 280 U.S. 117 (1929) and *Usery vs. Turner Elkhorn Mining Company*, 428 U.S. 16 (1976).

Due to the uncontested fact that Petitioner failed to raise any Federal questions prior to its filing of petition for rehearing in the Florida Supreme Court, and due to the uncontested fact that the State Courts did *not* decide any question concerning the constitution, a treaty or statute of the United States, this court is completely without jurisdiction to grant a Petition for Writ of

27. (A 19-20)
28. (B 7)

Certiorari and thus Jupiter's Petition for Writ of Certiorari must be denied.

II. THE QUESTION OF WHETHER SUBTERRANEAN WATER RIGHTS CONSTITUTE PROPERTY WHICH IS SUBJECT TO CONDEMNATION HAS ALREADY BEEN DECIDED BY THIS COURT.

This court has, on at least two occasions, upheld rulings that are essentially identical to the ruling in the case at Bar.

In *Williams vs. The City of Wichita*, 374 P. 2d 578 (Kan. 1962), a suit was brought by the owner of land to enjoin a city from drilling wells and pumping underlying waters. The City of Wichita drilled and was pumping water from its Wichita wellfield in Harvey County, Kansas. The Plaintiff alleged that the pumping of the wells would divert subterranean water from under his land, resulting in his irreparable injury. The lower court entered judgement for the Plaintiff and found that the Water Appropriation Act of Kansas was unconstitutional and permanently enjoined the city from pumping the water from its wells. The evidence showed that the City of Wichita filed an application with the Division of Water Resources under the act for a permit to drill and pump 20 new wells in its wellfield located in Harvey County.

The Kansas Supreme Court indicated in it's opinion that percolating ground waters are "migratory and fugitive". The court indicated that it was dealing "with a right to *use* the underground waters as they passed through the owner's soil." The court further noted that the Water Management Act changed the common law that percolating ground waters belonged to the owner of the land in which it was found and vested such ownership of the corpus of the water in the State of Kansas. The Kansas Supreme Court, in embarking on an extremely lengthy decision, reversed the lower court's decision and upheld the right of the Division of Water Resources to allocate the water to the City of Wichita.

The Supreme Court of Kansas cited the exact same section of Corpus Jurus Secundum as was cited by the Florida Supreme Court in the case at Bar:

"There can be no ownership in seeping and percolating waters in the absolute sense, because of their wandering and migratory character, unless and until they are reduced to the actual possession and control of the person claiming them. Their ownership consists in the right of the owner of the land to capture, control, and possess them, to prevent their escape, if he can do so from his land * * *. If percolating waters escape naturally to other lands, the title of the former owner is gone; while a landowner may prevent the escape of such waters from his land, if he can do so, yet he has no right to follow them into the lands of another and there capture, control, or reduce them to possession."

Thus the Supreme Court of Kansas rejected in totality the suggestion that an owner of land had a vested right in the percolating water below his land, and held he is not entitled to condemnation when such waters are withdrawn by a prior user. The *Williams vs. City of Wichita* case, supra, was appealed from the Supreme Court of Kansas to this court. A motion to dismiss was filed and granted as the appeal failed to state a substantial Federal question. *Williams vs. City of Wichita, Kansas*, 375 U.S. 7 (1963).

In *Baumann vs. Smirha*, 145 F.Supp, 617 (DC Kan. 1956). The Kansas Water Management Act was challenged in Federal Court on a number of constitutional grounds, one of which was the claim that percolating water constituted a property right which could not be divested from a landowner without due process of law and compensation. The Baumanns owned land situated in Harvey County, Kansas, which overlaid a geological formation containing a vast quantity of water known as the "Equus Beds". These beds contained a substantial amount of potable water. The Baumanns brought action by way of declaratory judgement, seeking to have the Kansas Water

Appropriation Act of 1945 declared invalid on the grounds that it violated the 14th Amendment of the U.S. Constitution.

In considering the constitutionality of the act, the Federal District Court unequivocally held:

1. A landowner does not have a vested right in underground percolating water underlying his land, which he has not appropriated and put to a beneficial use.

2. A state can pass a Water Management Act utilizing the Doctrine of Prior Appropriation to vest in other landowners the right to continue to use waters withdrawn, even if they are from underneath another's land.

3. Such water management acts do not violate the 14th Amendment to the United States Constitution as taking of property without due process of law.

4. Under such a scheme, the complaining landowner must invoke only the remedies afforded under the Water Management Act.

5. Even though prior decisions of a State Court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a depravation of property without due process of law under the 14th Amendment.

This decision, which is directly on point with the questions involved in Petitioner's petition for Writ of Certiorari was affirmed by this court in Baumann vs. Smirha, 352 U.S. 863 (1956).

The United States Supreme Court cases cited by Petitioner on the issue of condemnation are all distinguishable from the case sub judice. The Petitioner cities *Pumpelly vs. Green Bay*, 80 U.S. 166 (1871) in which construction of a dam flooded the

Plaintiff's property. Petitioner also cities *U.S. vs. Lynah*, 188 U.S. 445 (1903) in which the government's work on a river caused water to percolate onto the Plaintiff's land, turning his rice plantation into a bog.[29] In both of these cases, it was the individual's *land* which was taken.

In this case, Jupiter was not deprived of the highest and best use of its land. In fact, it wasn't even deprived of the potable water beneath its land. It was merely required to drill deeper in order to acquire water.

Petitioner cites the case of *Cappaert vs. United States*, 426 U.S. 270 (1976) in its petition and states that this case stands for the proposition that the Federal common law "has long recognized water rights and ground water as a protectable property interest".[30]

To the contrary, this case recognizes that the State's law of prior-appropriation applies and the court ruled that since the Cappaerts had not appropriated any of the ground water under their land, prior to the enactment of a presidential proclamation, they had no vested rights in the water:

> "This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of *future appropriators*.
>
> * * * * * * * * * * * * * * * * * *
>
> The District Court and the Court of Appeals correctly held that neither the Cappaerts nor their predecessors in interest had acquired any water rights as of 1952 when the United States water rights vested. Part of the land now comprising the Cappaerts' ranch was patented by the United States to the Cappaerts' predecessors as early as

29. (B 15)
30. (B 19)

1890. None of the patents conveyed water rights because of the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321, provided that such patents pass title only to land, not water. Patentees acquire water rights by "bona fide prior appropriation," as determined by state law. *California Oregon Power Co. vs. Beaver Portland Cement Co.*, 295 U.S. 142, 55 S.Ct. 725, 79 L.Ed. 1356 (1935). *Under Nevada Law water rights can be created only by appropriation for beneficial use.* Nev. Rev. Stat. §§ 533.030, 534.020, 533.325 (1973). *Jones vs. Adams*, 19 Nev. 78, 6 P. 442 (1885). *Under the doctrine of prior appropriation, the first to divert and use water beneficially establishes a right to its continued use as long as the water is beneficially diverted.* See *Colorado River Water Cons. Dist. vs. United States*, 424 U.S. 800, 805, 96 S.Ct. 1236, 1240, 47 L.Ed.2d 483 (1976). See also J. Sax, Water Law, Planning & Policy — Cases and Materials, 218 — 224 (1968). *Neither the Cappaerts nor their predecessors in interest appropriated any water until after 1952."* (Emphasis Supplied)

In Florida, as in Nevada, rights in water can only be created by appropriation for the beneficial use of the individuals. In this case, Tequesta is a prior user of the shallow well aquifer. Jupiter should not be allowed to deny them their rights to the use of the water in the shallow well aquifer by obtaining a permit. By over use of the shallow well aquifer, serious saltwater intrusion will occur. Therefore, since Tequesta was the prior user, it has the continued right to withdraw the water and Jupiter must look elsewhere.

This court has, on numerous occasions, recognized the Doctrine of Prior Appropriation and the fact that in order to acquire a right to water one must appropriate the water and apply it to a beneficial use. *Colorado River Water Conservation District vs. United States*, 424 U.S. 800 (1976), *State of Arizona vs. State of California*, 373 U.S. 757 (1963).

Jupiter has never appropriated any of the water from the shallow well aquifer underneath its land and therefore has no water rights vested therein.

III. THE DECISION OF THE FLORIDA SUPREME COURT IS BASED SOLELY UPON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

As fully argued supra, this case was decided *solely* upon State Law grounds. The Florida Supreme Court ruled that Petitioner's sole remedy in this case was through proper application for a permit under the Florida Water Resources act. The Petitioner has applied for a permit under the act and this permit was denied. No appeal was taken.

Under the Florida Water Resources Act, the Water Management Districts are vested with the power to deny permits where the geological circumstances show that to allow withdrawal of water would injure the resource. Certainly, Landowners near the coast of Florida are not acquiring permits to withdraw water from the shallow well aquifer due to the danger of saltwater intrusion. Would Petitioner argue that the Water Management District should pay compensation to each and every landowner whose request for a permit to withdraw water from its shallow well aquifer is denied? Such a result would totally destroy the effect of the Florida Water Resources Act and would be contrary to the Doctrine of Prior Appropriation followed for many, many years in Florida, and recognized and approved by the United States Supreme Court.

CONCLUSION

Based upon any one, or all, of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN T. ALLEN, JR., P.A.
4508 Central Avenue
St. Petersburg, FL 33711
(813) 321-3272

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 1979, three copies of the foregoing Respondent's Brief in Opposition have been furnished by mail to: JOHN C. RANDOLPH, 310 Okeechobee Blvd., West Palm Beach, Fla. 33402, Counsel for Respondent Village of Tequesta; FRED P. BOSSELMAN, Ross, Hardies, O'Keefe, Babcock & Parsons, One IBM Plaza — Suite 3100, Chicago, Illinois, 60611, Counsel for Petitioner; MARJORIE DIANE GADARIAN, Jones, Paine & Foster, P.A., 601 Flagler Drive Court, P.O. Drawer E, West Palm Beach, Florida, Counsel for Petitioner.

Attorney

APPENDIX

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL DISTRICT OF FLORIDA
IN AND FOR PALM BEACH COUNTY
CIVIL ACTION

NO. 74-2912CA (L) - 01

CIVIL DIVISION

JUPITER INLET CORPORATION,
a Florida corporation,
Plaintiff,
vs.
THE VILLAGE OF TEQUESTA, a Florida municipal corporation, and THOMAS J. LITTLE, WILLIAM E. LEONE, WILLIAM J. TAYLOR, DOROTHY M. CAMPBELL and ALMEDA A. JONES, Town Councilmen of THE VILLAGE OF TEQUESTA,
Defendants.

COMPLAINT FOR INVERSE CONDEMNATION AND PROHIBITORY INJUNCTION

COMES NOW the Plaintiff, JUPITER INLET CORPORATION, a Florida corporation, by and through its undersigned attorneys, and for Complaint against the Defendants, says:

COUNT I

1. This is an action for the inverse condemnation of private property located in Palm Beach County, Florida.

2. Plaintiff is a corporation duly organized and existing under the laws of the State of Florida, with its principal place of business located in Palm Beach County, Florida.

3. Defendant, THE VILLAGE OF TEQUESTA, is a municipality existing under the laws of the State of Florida, and located in Palm Beach County, Florida.

4. Defendants, THOMAS J. LITTLE, WILLIAM E. LEONE, WILLIAM J. TAYLOR, DOROTHY M. CAMPBELL, ALMEDA A. JONES, are members of and comprise the town council of THE VILLAGE OF TEQUESTA, and are residents of Palm Beach County, Florida.

5. Plaintiff is the owner in fee simple absolute of certain real property located in Palm Beach County, Florida, more particularly described in Exhibit A, attached hereto and made a part hereof.

6. Defendants, by the intentional pumpage of ground water from their municipal well field number four (4) located in proximity to Plaintiff's above-described real property, have so drained the ground water resources of Plaintiff's above-described real property as to render said property unusable for any purpose and have thereby taken said private property.

7. Defendants, by the intentional pumpage of ground water from their municipal well field number four (4) located in proximity to Plaintiff's above-described real property, have so drained the ground water resources of Plaintiff's above-described real property as to deny Plaintiff the reasonable use and enjoyment of said ground water naturally occurring on Plaintiff's above-described real property and have thereby taken said private property.

8. Defendants are presently and threaten to continue the future pumping of ground water from their well field number four (4) so as to further drain the ground water from Plaintiff's property.

9. Defendants' pumpage from the above-described well field has been used to supply residents of THE VILLAGE OF TEQUESTA and others with their domestic, commercial and industrial water use requirements.

10. Plaintiff has been deprived of the use and enjoyment of the said property without payment of full compensation by the Defendants.

11. Plaintiff says that the damages described herein are great and prays that a hearing be accorded it before a jury in order that full compensation may be fixed and determined for the loss occasioned by this taking.

12. Plaintiff says that it has been required to employ attorneys to represent it in this cause, and thus have become obligated for a reasonable attorneys' fee, and that it will be required to incur fees and expenses for appraisers, engineers, surveyors and other expert witnesses. Further, Plaintiff will incur reasonable costs and expenses in the preparation and presentation of this case, for which Plaintiff is entitled to be reimbursed and paid by the Defendants in accordance with the Constitution of the State of Florida and Florida Statutes §73.091 (1973).

WHEREFORE, Plaintiff prays that Defendants be required to pay Plaintiff full compensation for the taking of said private property, costs, attorneys fees, costs and fees for expert witnesses, and such other and further relief as this Court may deem just and equitable.

COUNT II

1. This is an action for a prohibitory injunction.

2. Plaintiff realleges and reaffirms allegations of Paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of Count I.

3. Plaintiff is without an adequate and efficient remedy at law.

4. Plaintiff will suffer irreparable injury from Defendants' continued actions unless Defendants are enjoined from further pumpage from well field number four (4).

WHEREFORE, Plaintiff prays that Defendants be temporarily and permanently enjoined from pumping ground water from their municipal well field number four (4) as to deny Plaintiff its right to the reasonable use of its own ground water resources, costs, and further, that Plaintiff receive such other relief as this Court may deem just and equitable.

JONES, PAINE & FOSTER, P.A.
Attorneys for Plaintiff
P.O. Drawer E
West Palm Beach, Florida 33402
659-3000

By _____
Burton C. Smith, Jr.

EXHIBIT A

That part of Government Lot 1, Section 30, Township 40 South, Range 43 East, Palm Beach County, Florida, lying Easterly of the right-of-way of U.S. Highway Number 1 (State Road No. 5), less, however, the North 400 feet thereof and the South 450 feet thereof; and, that promontory of land in Government Lot 1, Section 30, Township 40 South, Range 43 East, more particularly described as follows:

From the intersection of the North line of said Govt. Lot 1 and the centerline of U.S. Highway 1, (State Road 5) run Southeasterly on said centerline 419.57 ft. to a point in a line which is 400 ft. Southerly of and parallel to said North line of Govt. Lot 1; thence Easterly parallel to said North line of Govt. Lot 1 a distance of 347.45 ft. more or less to the East shore of Hobe Sound, (also known as Jupiter Sound); thence continue Easterly on same course across the mouth of an estuary of Hobe Sound (which extends Southeasterly 200 ft. more or less) 110 ft. more or less to the Westerly shore of a promontory extending Northerly to the shore of Hobe Sound which is the point of beginning; thence continue Easterly on same course 235 ft. more or less to the Westerly shore of Hobe Sound; thence meander said shore in a Northeasterly, Westerly and Southwesterly direction 300 ft. more or less to the point of beginning.

* * * * * * * * * * * * * * * * * *

HARRY FRED LAND

Q. Were you present at a hearing held by the Central and Southern Florida Flood Control District on the application for consumptive use permit for the Village of Tequesta?

A. I was there.

Q. Did you have occasion at that time to acquaint yourself with the actual location of this piece of property owned by the Jupiter Inlet Corporation?

A. Yes.

Q. Have you also appeared in front of the Board of Palm Beach County Commissioners speaking specifically to water resources at the Jupiter Inlet Corporation property?

A. Yes.

Q. Is this piece of property in proximity to any of the existing well fields of the Village of Tequesta?

A. This piece of property is located on the line between the Tequesta well field number four and the Intercoastal Waterway on the Intercoastal side on the Intercoastal third or Intercoastal quarter of that cross section.

Q. However, the well field number four is the Jupiter Inlet property?

A. If my memory serves me correctly, it is about 900 feet, something like that.

Q. Has there been salt water intrusion into well field number four from the Intercoastal side?

A. Yes, there has.

Q. Do you have an opinion as to what has caused that salt water intrusion?

A. It's been withdrawals, ground water withdrawals in that area, but it also could have been caused by other wells other than Tequesta's municipally owned wells contributing to it.

Q. You say ground water withdrawals in the area. Can you give me a percentage of withdrawals made by the Village of Tequesta to the overall withdrawal?

A. We haven't made any water use studies in that area. I could estimate.

Q. Would you estimate?

A. I would estimate it would be a substantial part.

Q. Ninety percent?
A. I would rather not tack any numbers on it.

Q. Just as a matter of clarification in my mind, when you appeared in front of the hearing examiner for the FCD, did you have the occasion to state that the Village of Tequesta was the majority user or withdrawal of water in that area is possibly 90% of withdrawals or even greater?
A. That is a reasonable estimate at that time and it still may be a reasonable estimate. I don't have any data to back that up.

Q. Okay. Has there been salt water intrusion into well field number four specifically?
A. Yes. Well field number four has had wells dammed by salt water intrusion, their utility has been dammed.

Q. Could you describe the nature of that salt water intrusion?
A. Nature?

Q. Where it is coming from?
A. Salt water intrusion has come from the Intercoastal Waterway in the lower portion of the aquifer.

Q. How have you determined there has been salt water intrusion in well field number four?
A. Not only from the chloride content of the supply well, Tequesta supply wells have gone up, we have also installed salinity monitoring well in the area and those wells are designed and installed with the intent of determining the position of the salt water front and then with the intent of monitoring its changes with time.

Q. Would you say that there is a certainty in your mind that there has occurred salt water intrusion in well field number four, it has come from the Intercoastal waterway?
A. Yes.

Q. Would you also state there is a certainty in your mind that this is the result of withdrawals in the area, be they withdrawals by the Village of Tequesta or other users?
A. Yes. Intrusion had to be caused by stress and that stress was withdrawal, ground water withdrawals.

Q. Has there been what is called mining of water in that area?
A. The definition of mining presents a problem.

Q. How would you define it?
A. Mining to me is when you withdraw resource that is not, can't be replaced. In that area mining may be used but the resource would be replaced if all the withdrawals, of course, stopped and it would probably take quite a number of years for the resource to be replaced but it could be.

Q. So you are stating that there has been no mining of water up there, given the definition you have just given?
A. There has been a reduction in the quantity of fresh water in the shallow ground water aquifer in the area over a number of years. If you want to tag that as mining, you can tag it as mining. Essentially I think this is what you intended.

Q. Are you familiar with the term area of influence?
A. Yes.

Q. What does that mean to you?
A. Well, the area of influence is the area that a well received, a well influences the potential metric surface of the —

Q. What is this word?
A. That is the water level or water table. This is when you pump a well, its distance, its an area, it is also the distance out to however the influence is felt. In ground water you extend that all directions. That is the area this well field influences.

Q. Are you familiar with the area of influence of well field number four?
A. I spent time looking at that.

Q. Is the area of influence of well field number four, does it cross over U.S. 1 and encroach on Jupiter Inlet property?
A. For salt water intrusion to do that, it had to do that.

Q. How long has the area of influence encroached the Jupiter Inlet property?
A. I don't have data to verify that. I can't determine that.

Q. When was the first time USGS observed encroachment to the Jupiter Inlet property?
A. We installed a number of monitoring wells back in 1970 or so and we prepared our first water table contour map in January of '74 and the best means of determining or estimating the area of influence would be from the water table contour map. It would be January of '74.

Q. All right. Using that first water table contour map dated

January, 1974, did the area of influence of well field number four encroach the Jupiter Inlet property at that time?

A. Yes, I think — it may not have been at that time. It might have been later during the on coming dry season before the rains have influenced out that far.

Q. When would have been later, it would have encroached?

A. Latest or earliest?

Q. Latest.

A. Latest it would have encroached?

Q. Right. You said January, 1974 it possibly could have been encroaching at that time, you weren't sure?

A. Right.

Q. From what I gathered from your answer it certainly would have encroached by the dry season?

A. Oh, let's say March or something like that of '74 would probably be the first time that a hydrologist or someone with expertise in water table contour maps and knowledge of ground water systems could have interpreted this from the data.

Q. Assuming that March, 1974 would have been the later date encroachment occurred in the Jupiter Inlet property, has encroachment been constant since then to the present?

A. No. There are intermittent times, at least portions of the year, during the wet season when ground water levels are high enough where the water derived from well field number four could be increased in the immediate area of the well field four. It doesn't have to tax the area as far away as the property in question is located to satisfy its demand.

Q. Could you explain to me the mechanics of salt water intrusion and if you would relate them specifically to well field number four in the Intercoastal Waterway?

A. Salt water intrusion is caused by a reduction in the water levels in the interior. When the reduction becomes low enough that it no longer can stand the pressure of, as exerted by the constant head, the constant water levels maintained by the Intercoastal Waterway, plus the density pressures that salt water generates because it is higher than fresh water, this is when salt water intrusion occurs because there is a reduction in the water level in the interior.

Q. As to well field number four, if I drilled a well and just withdrew water from, say, one hundred feet around it and

I was a quarter of a mile from the Intercoastal Waterway, would that cause salt water intrusion?

A. No, but you wouldn't get much water.

* * *

Q. Do you remember what the Broadview or Jupiter Inlet property proposal for withdrawals from the property are?

A. If my memory serves me correctly, it was something like 32,000 gallons a day.

Q. Would that withdrawal of 32,000 gallons a day have impact upon the ability of the Tequesta well field number four?

A. I stated before I thought it would be detrimental to the area, slightly detrimental, I believe.

Q. What do you mean by that?

A. I mean it will reduce the ground water levels that have to be maintained at a higher level than they have been maintained historically to keep salt water from advancing in them.

Q. Are you familiar with the term fresh water head?

A. Yes.

Q. What does this mean to you?

A. Fresh water head, that is the level when you drill a well in there that the water will stand in that well.

Q. Is there what is called or has been called —

A. If it had salt water in it it will have a different head. If it is drilled into the salt water, you can convert salt to fresh. The density of water will be one instead of 1.05.

Q. I have heard the term fresh water ridge along U.S. 1?

A. Yes.

Q. Are you familiar with the use of that term?

A. I have used it.

Q. What does that mean?

A. That means to stabilize the position of a salt water front there has to be a minimum, at least a minimum fresh water head at the critical location to keep salt water from advancing inland. If that head is broken down below this minimum amount, this permits the higher pressure in the Intercoastal Waterway to assert itself and allow it to start advancing or moving inland. That is it.

Q. Is it the goal of the USGS in their operation with the Village of Tequesta to maintain fresh water ridge or head along U.S. 1?
A. We really don't have any goals like that. I think it would be the goal of Tequesta and the consultant to operate the system in that

* * *

Q. When you first acquainted yourself with the proposal of Jupiter Inlet Corporation for withdrawals from this property, did you know of any proposals for a charge?
A. Yes.

Q. Do you remember what those proposals were?
A. As I understand it, and we have had discussions with the DOT that they plan to put drains, some drain collectors along U.S. 1 and to run a perforated pipe down U.S. 1, lay in the concrete with slots in the pipe and the storm water that runs off the highway would run into the perforated drain would percolate into the ground water system through these drains. If there was storm excess, if it was greater than the perforations would allow to pass, that this excess would run into a small lake at the end of the property.

Q. Did you have the opportunity to make a quantitative evaluation of the proposed run off into the small lake?
A. I haven't made any quantitative calculations. I believe this would be small, maybe not small quantitative-wise, but it would occur in such a, it wouldn't be a real plus to the Broadview recharge of the lake or whatever. They said on the small storm performation of the pipe would discharge all the water. This would be excess rain to the lake. Whenever there was excess rain into the lake, at the same time the lake would be full from water within the development itself. It would run in there, what water would come through this DOT over flow system would be coming at a time when everything is full. Anyway, it would run into the Intercoastal Waterway.

Q. On what do you base your conclusions?
A. On engineering experience and judgment.

Q. Factually, are you basing them on conversations with DOT?
A. I had conversations with the DOT. This is how they expect the system to work.

Q. What you are saying, you wouldn't expect any recharge from the proposed drainage of U.S. 1 into that lake?
A. I think there would be very little ground water recharge through that lake.

Q. When you say very little, what do you mean put in gallons per day?
A. You can't put it on a per day basis because there is, the ground water formations are so permeable you can't store much water. The plot is so low you can't build up the ground water and coast for a period of time. It is storm oriented after a couple of days, you are back to where you were to start off with. You can't store the storm water to hold you back during the several months of the dry period which is your critical time. In hydrology you have to work with extremes and it is very difficult and any of the systems that are designed, the average are most likely going to be inadequate.

Q. The proposal of Jupiter Inlet Corporation is roughly 32,000 gallons a day withdrawal. How would this impact on the Village of Tequesta's operation of well field number four?

MR. WEAVER: Object to the form of the question.

BY MR. SMITH:

Q. Go ahead and answer.
A. I think I have answered this before in that the operation of withdrawal of shallow ground water systems will reduce the fresh water head. This needs to be built between well field four and the Intercoastal Waterway. If other people are withdrawing water, that will present cut backs by the Village of Tequesta, to raise this tremendously, cut back additional amounts to bring it back up to the minimum.

Q. Quantitatively how much will it reduce the fresh water head?

MR. WEAVER: Object to the form of the question.

THE WITNESS: It was about three-tenths of a foot, something like that. I have calculated it before.

BY MR. SMITH:

Q. Is that in your professional opinion a significant reduction of the fresh water head?
A. When you are already in the red, anything is significant, at least slightly significant. I've been trying to qualify that.

Q. If I understand you correctly, it is already in the red because of present withdrawals from the aquifer?
A. Yes. Part of the year it is in the red.

Q. Do you have data that will allow you to draw conclusions specifically as to who makes withdrawals from that aquifer?
A. We haven't made a water use study in the area to determine how many wells in the area, what they pump.

Q. Do you know if anyone has made a water use study of that nature?
A. Possibly the county has. These days I really doubt it because so many of these are private wells that are instrumental, I am sure they don't make any records.

* * *

WILLIAM SYDOW

Q. Now, have you formed a professional opinion as to the specific mechanics of the salt water intrusion of Well Field No. 4, and how they come from the Intracoastal Waterway?
A. As to the intrusion?

Q. Yes, sir.
A. From the data that has been collected and from the material prepared from this data by the United States Geological Survey, the elevations of the ground water in the vicinity of the wells of Well Field No. 4 have been lower than the required head, to prevent movement of salt water into the fresh water, due to this difference in density.

Q. Now, when you say that the elevations of fresh water from the area of the wells has been lower, do you mean the specific area of Well Field No. 4?
A. Well, each well, when it is pumped, produces a reduction in the elevation of the water, which is at its greatest in the immediate adjacent vicinity of the well, and this effect of decreasing of this water level, I should say, any effect of decrease in the water level, changes with the distance from the well, and they developed what is described technically as a cone of depression. If you take a cross section area, it looks sort of like an increase cone, or you have a number of wells, in an area such as is in Well No. 4, you will have little individual cones around each one, but in effect, the well will — the multiple wells act very simply to what you

might consider a single well, and you have a large cone of depression.

Q. It kind of equals the sum of parts type of thing?
A. Generally it could be construed as that.

Q. Could you define for me the engineering term "cone of depression"?
A. I thought I just had done this.

Q. Just as succinctly as you can, as a definition,
A. This is the surface of the ground water, this is a depression in the surface of the ground water as a result of withdrawal or removal of the water from the ground due to pumping by wells. You could also get a cone depression, it wouldn't necessarily be a cone, but it could be a similar shape, where you have a stream passing through an area, and then the ground water at the edge flowing into the sides of the bank of the stream, would result in this sort of a cross section that it would look like if you took the cross section.

Q. Could you define the engineering term, "fresh water head" for me?
A. That is the term which is normally used as the elevation of fresh water, or the difference of the elevation of fresh water, and the elevation of the adjacent surface waters, that are salient in nature.

Q. Did you have occasion to appear in front of the Board of Palm Beach County Commissioners sitting as the Zoning Board for Palm Beach County in reference to an application of the Jupiter Inlet Corporation, for a temporary water and sewer treatment facility by the property that has been referred to as the Broad View property?
A. This is in front of the County Commissioners? Yes, sir, I did.

Q. In what capacity did you appear in front of them?
A. I appeared before the Commission at the direction of the Village of Tequesta, to protest the construction of a well that was being considered by the Jupiter Inlet Corporation, and I presented a letter to the County Commission outlining our objections and recommendations as to the manner in which we thought the problem should be handled. That letter indicated, and I believe I read the letter at the time, that there were some differences of opinion between the consulting engineers for the Jupiter Inlet Corporation and

themselves, and we recommended that it be — the problem be placed before it.

Q. I was looking for a copy of that letter. I have some correspondence here. If you have a copy of it, Mr. Sydow, I would appreciate it if you might be able to pull it out and refer to it.

A. There's the Planning Commission, yes, that occurred — the letter was written on July 23rd, and the hearing was on July 25th, and we recommended that Board of County Commissioners take the following action: 1, request the Central Florida Control District to advise the possible effect of a proposed well on the Village of Tequesta water supply. 2, Ask the United States Geological Survey to provide their technical expertise to the Central and Southern Flood Control District. 3, Postpone action on the petitioner's request until a decision is reached by the Central and Southern Florida Flood Control District.

Q. May I see that letter, please, sir? You have just stated on your deposition, also in the letter, that you appeared at the instruction of the Village of Tequesta, who specifically asked you to appear.

A. We received a letter from the Village instructing us to do this.

Q. Do you have a copy of that letter?

A. Yes.

* * *

A. That was July 11th.

Q. No, sir, July 23rd.

A. You are quoting?

Q. I am quoting from the letter of July 11th, I mean July 23rd.

A. That paragraph refers to a letter.

Q. To the paragraph, and it refers to your appearance in front of the Planning and Zoning Commission?

A. On July 10th we prepared a letter, which was hand delivered to the Palm Beach County Planning and Zoning Commission.

Q. No, I'm asking what you mean in your letter of July 23rd, when you say that the proposed wells could endanger the Village of Tequesta's potable water supply wells, what you mean, and what you meant when you wrote that letter?

A. We meant that there was a possibility, we didn't use the word "would", we used the word "could", and —

Q. What do you base that possibility on?

A. The possibility is based on the reduction of the fresh water head between — the Village of Tequesta wells and the Intracoastal Waterway, due to removal of fresh water from an area east of it.

Q. Was that possibility, as you envisioned it at that time, based upon engineering calculations and analyses?

A. That was based on the contour maps prepared by the United States Geological Survey, which showed a lowering of the fresh water table in the area east of Well Field 4, and as of May 6th, 1974, the survey contour map showed an elevation at the western edge of the Jupiter Inlet Colony of about half a foot.

Q. Was that all it was based on?

A. Well, it certainly created, in our minds, that there was a distinct possibility that this could be very damaging to additional withdrawals of water immediately east of the Tequesta Well Field, it could be damaging to the Tequesta Well Field, by reduction of this fresh water head.

Q. Mr. Sydow, you are a professional engineer, and you are talking about, it created in your minds the possibility that it could do it. Did you form a professional opinion that it was going to do it, and when I say "do it", I am referring to your phrase, "endanger the Village of Tequesta's potable water supply".

A. In my — you are asking for my professional opinion?

Q. Yes.

A. There was a distinct possibility that this could occur.

Q. Was it your professional opinion that it would occur?

A. Subsequently.

Q. I'm talking about at the time the letter was written.

A. The time the letter was written, there was — in my mind there was a strong possibility that this could occur.

Q. But, you have not formed a professional opinion as to whether or not it would occur?

MR. RANDOLPH: I object to the form of the question.

BY MR. SMITH:

Q. Is that correct?
A. As to a positive statement, no, it was a very strong possibility, we subsequently —

Q. Let me ask you this. Subsequently, have you formed a professional opinion as to whether or not it would happen?
A. Well, at the time the letter was written, and to the appearances made by the Board of County Commissioners, we recommended that the problem be given to the Central & Southern Flood Control District for their study and evaluation, and we prepared an opinion to the Central & Southern Flood Control District.

Q. Well, have you subsequently, in your mind, formed a professional opinion as to whether or not additional withdrawals of water from the Jupiter Inlet property would endanger the Village of Tequesta's potable water supply?
A. May I quote from our letter?

Q. You sure can.
A. The letter of August 5th to the Central & Southern Flood Control District, Jupiter Inlet Corporation, Inc., which we stated, "We understand that the statement has been made by the United States Geological Survey that a 40,000 gallons per day pumpage by the developer would reduce the ground water elevation by about 0.1 foot, and this reduction will occur in the area of the recommended ground water ridge. This would mean that the Village would have to reduce their pumpage from the existing wells more than planned to maintain this, it would have to locate an even larger supply than described above. If more than 40,000 gallons per day is pumped, this adverse condition will be made worse."

Q. So, you did reach a conclusion that any pumpage would endanger the Village of Tequesta's potable water supply?
A. This was — this decision or opinion, I should say, was based on a 40,000 gallon per day pumpage, and an opinion that we had obtained, not written from the Geological Survey, that the ground water reduction would occur at the point of the ridge at about 0.1 feet.

Q. At the time you were writing these letters and making these appearances, did you have any information as to what the ground water ridge was supposed to be, or recommended to be by the USGS?

A. This ground water ridge varies from time to time, and from about a plus one foot to as high as, say, a foot and a half, it varies through the year.

* * *

LEONARD LINDAHL

Q. I'm going back to my earlier question, then, was there a footage level they were trying to maintain?
A. Yes. The application that they had before the Flood Control District for the additional well field, in part, was justified by the proposed reduction in withdrawals at Well Field Number 4, which the Flood Control District would look favorably upon, so would I; so would anybody.

Q. They are trying to maintain a one foot level; is that correct?
A. Yes. There is a little fresh water head lying between Well Field Number 4 and the Intracoastal Waterway, which the Flood Control District felt to be very critical.

Q. And your studies indicated that the 38,000 gallons projected withdrawal might reduce that by one-tenth of a foot; is that correct?
A. During the dry period, yes, sir.

Q. Do you have an opinion as to whether or not the application that Broadview had before the Flood Control District, in order to drill its own well, would have adversely affected the fresh water head we have just been describing, one; and, two, the water supply in the Village of Tequesta?
A. During the dry season, the potential was there to lower the water table a tenth of a foot.

Q. Do you consider that significant?
A. No, I don't consider a tenth of a foot in lowering the water table to be significant, unless there are some peripheral conditions that make it significant. In the data that was subsequently supplied to me, it appeared as though, and this is as a result of my conversations with the Flood Control District, that the water withdrawal wells in Well Field Number 4 had certainly magnified the significance of this little fresh water head lying between it and the Intracoastal, to the point where the Flood Control District felt that lowering it at all would not be in the best interests of the general area, until some corrective measures were made in Well Field Number 4. And in looking at the data, I really could-

n't take issue with that statement. The activities in Well Field Number 4 appear to have lowered the fresh water head in the vicinity of Broadview and U.S. 1, to where it was becoming critical.

Q. Who are the agencies responsible for allowing the drilling of new wells in that area?
A. The Water Management Division of the State of Florida have been delegated the authority to issue well permits, I believe.

Q. The specific management, with regard to this property —
A. The Central and Southern Flood Control District.

Q. Mr. Lindahl, has there been a projected unit price cost made on this project?
A. For what, sir?

Q. For the building of the apartments and development of the property?
A. I wouldn't have any idea what the cost is for building the apartment. I do have the cost for site development, not with me. My subpoena said anything with regard to the water.

Q. Right. Have you had any informal discussions with the owners or through any other means or method, as to what their projected selling price per apartment on this project is, when completed?
A. No. Again, I don't have any information on the building cost itself. We are not engineers for the building, the architect has his own engineers for the building construction. I have a suspicion as to the range, but that is not factual.

Q. Do you know what the property is zoned as?
A. Yes, sir, RH.

Q. And is that in the County?
A. Yes, sir, it is.

Q. Do you know how many units per acre that permits?
A. It is right around sixteen units per acre, if you go with straight zoning.

Q. Has the owner, to your knowledge, applied for a special exception zoning on this property?
A. Yes, sir.

Q. Did you participate in that petition?
A. I participated in the petition regarding the special exception

to allow a waste water treatment facility and a water treatment facility on the property, to serve the project, not to serve anybody else.

Q. And was that petition granted?
A. With conditions, yes, sir.

Q. And what conditions were those, sir?
A. The conditions were that we seek alternative sources for a water supply, other than the ground water and the city water.

Q. And have you acted upon those conditions?
A. We are acting upon them currently.

Q. What actions are you taking?
A. We have just received a permit from the Florida State Department of Health and Rehabilitative Services, Division of Health, Water Supply Section, for the construction of a reverse osmosis water treatment plant to process for a potable supply the waters that can be withdrawn from a Florida aquifer, and it would be our intent to secure a well permit to go to the Florida aquifer and seek that water supply.

* * *

Q. Okay. How long have you been employed by the Jupiter Inlet Corporation?
A. For this particular project?

Q. In any capacity.
A. The Jupiter Inlet Corporation has been using our services since 1971.

Q. And how long, with regard to this specific project?
A. Since late 1972, I believe, was our first contact.

Q. I may have covered this before, but let me ask you again, so it will appear on the record, does the same ground water aquifer serve both the Broadview property and Well Field No. 4?
A. The same shallow ground water aquifer, yes.

Q. All right.

* * *

EXAMINATION

BY MR. RANDOLPH:

Q. Mr. Lindahl, you talked about your appearance before the Palm Beach County Zoning Commission in regard to get-

ting a special exception for the Broadview project. Did you receive any written communications as to what you should represent

* * *

A. Just preparing the land for the construction. Preparing the soil so that it will withstand the loading of the footers, structural loaders of building.

Q. Okay. Anything else?
A. Not to my knowledge.

Q. Do you feel that this area of land on which the Broadview project is to be constructed would have been able to adequately support the project? If it had not been for the withdrawals by the Village of Tequesta, can you safely state that, as an engineer, that of course you can't predict the rainfall, but, based on average rainfall, the transmissibility, the average rain runoff, the safe yield, et cetera, that you would be able to draw enough water from this area of land to accommodate this project without any question?
A. In my opinion, yes, providing that the Village of Tequesta didn't draw down Well Field Number 4 so as to totally eliminate the possibility of utilizing the shallow ground water. The Village of Tequesta could draw water from Well Field Number 4 to an extent to where they could eliminate the utilization, totally eliminate it.

Q. Do you have an opinion as to the capacity this shallow aquifer would have allowed; in other words, can you state what you could take from the area, and what the Village of Tequesta could take from the area, and still have a safe yield?
A. No, sir, I can't state that based on our pumping tests. We feel that the withdrawals to support the project would have lowered the table a tenth of a foot during the dry seasons, adverse rainfall conditions, recharge conditions.

373.013 Short title. — This chapter shall be known as the "Florida Water Resources Act of 1972."

373.016 Declaration of policy.—

(1) The waters in the state are among its basic resources. Such waters have not heretofore been conserved or fully controlled so as to realize their full beneficial use.

(2) It is further declared to be the policy of the Legislature:

(a) To provide for the management of water and related land resources;

(b) To promote the conservation, development, and proper utilization of surface and ground water;

(c) To develop and regulate dams, impoundments, reservoirs, and other works and to provide water storage for beneficial purposes;

(d) To prevent damage from floods, soil erosion, and excessive drainage;

(e) To preserve natural resources, fish and wildlife;

(f) To promote recreational development, protect public lands, and assist in maintaining the navigability of rivers and harbors; and

(g) Otherwise to promote the health, safety, and general welfare of the people of this state.

(3) The Legislature recognizes that the water resource problems of the state vary from region to region, both in magnitude and complexity. It is therefore the intent of the Legislature to vest in the Department of [Environmental Regulation] or its successor agency the power and responsibility to accomplish the conservation, protection, management, and control of the waters of the state and with sufficient flexibility and discretion to accomplish these ends through delegation of appropriate powers to the various water management districts. The department may exercise any power herein authorized to be exercised by a water management district; however, to the greatest extent

practicable, such power should be delegated to the governing board of a water management district.

373.019 Definitions. — When appearing in this chapter or in any rule, regulations, or order adopted pursuant thereto, the following words shall, unless the context clearly indicates otherwise, mean:

(1) "Department" means the Department of [Environmental Regulation] or its successor agency or agencies.

(2) "Division" means the Division of Interior Resources or its successor agency or agencies.

(3) "Water management district" means any flood control, resource management, or water management district operating under the authority of this chapter.

(4) "Governing board" means the governing board of a water management district.

(5) "Reasonable-beneficial use" means the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest.

(6) "Person" means any and all persons, natural or artificial, including any individual, firm, association, organization, partnership, business trust, corporation, company, the United States of America, and the state and all political subdivisions, regions, districts, municipalities, and public agencies thereof. The enumeration herein is not intended to be exclusive or exhaustive.

(7) "Domestic use" means any use of water for individual personal needs or for household purposes such as drinking, bathing, heating, cooking, or sanitation.

(8) "Nonregulated use" means any use of water which is exempted from regulation by the provisions of this chapter.

(9) "Water" or "waters in the state" means any and all water on or beneath the surface of the ground or in the atmosphere, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground, as well as all coastal waters within the jurisdiction of the state.

(10) "Ground water" means water beneath the surface of the ground, whether or not flowing through known and definite channels.

(11) "Surface water" means water upon the surface of the earth, whether contained in bounds created naturally or artificially or diffused. Water from natural springs shall be classified as surface water when it exits from the spring onto the earth's surface.

(12) "Stream" means any river, creek, slough, or natural watercourse in which water usually flows in a defined bed or channel. It is not essential that the flowing be uniform or uninterrupted. The fact that some part of the bed or channel shall have been dredged or improved does not prevent the watercourse from being a stream.

(13) "Other watercourse" means any canal, ditch, or other artificial watercourse in which water usually flows in a defined bed or channel. It is not essential that the flowing be uniform or uninterrupted.

(14) "Coastal waters" means waters of the Atlantic Ocean or the Gulf of Mexico within the jurisdiction of the state.

(15) "Impoundment" means any lake, reservoir, pond, or other containment of surface water occupying a bed or depression in the earth's surface and having a discernible shoreline.

* * *

shall notify any affected governing boards, and shall give notice of such hearing by publication within the affected region pursuant to the provisions of chapter 120, except such notice by publication shall be extended at least 90 days in advance of such hearings.

(6) For the purposes of this plan the department may, in consultation with the affected governing board, divide each water management district into sections which shall conform as nearly as practicable to hydrologically controllable areas and describe all water resources within each area.

(7) The department shall give careful consideration to the requirements of public recreation and to the protection and procreation of fish and wildlife. The department may prohibit or restrict other future uses on certain designated bodies of water which may be inconsistent with these objectives.

(8) The department may designate certain uses in connection with a particular source of supply which, because of the nature of the activity or the amount of water required, would constitute an undesirable use for which the governing board may deny a permit.

(9) The department may designate certain uses in connection with a particular source of supply which, because of the nature of the activity or the amount of water required, would result in an enhancement or improvement of the water resources of the area. Such uses shall be preferred over other uses in the event of competing applications under the permitting systems authorized by this chapter.

(10) The department, in cooperation with the Division of State Planning of the Department of Administration, or its successor agency, may add to the state water use plan any other information, directions, or objectives it deems necessary or desirable for the guidance of the governing boards or other agencies in the administration and enforcement of this chapter.

373.042 Minimum flows and levels. — Within each section, or the water management district as a whole, the department or the governing board shall establish the following:

(1) Minimum flow for all surface watercourses in the area. The minimum flow for a given watercourse shall be the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area.

(2) Minimum water level. The minimum water level shall be the level of ground water in an aquifer and the level of surface water at which further withdrawals would be significantly harmful to the water resources of the area.

The minimum flow and minimum water level shall be calculated by the department and the governing board using the best information available. When appropriate, minimum flows and levels may be calculated to reflect seasonal variations. The department and the governing board shall also consider, and at their discretion may provide for, the protection of nonconsumptive uses in the establishment of minimum flows and levels.

373.114 Land and Water Adjudicatory Commission; review of district policies, rules, and orders. — The Governor and cabinet, sitting as the Land and Water Adjudicatory Commission, shall have the exclusive power by a vote of four of the members, to review, and may rescind or modify, any rule or order of a water management district, except those rules which involve only the internal management of the water management district, to insure compliance with the provisions and purposes of this chapter. Such review may be initiated at any time by the Governor and cabinet, by the secretary, by the Environmental Regulation Commission, or by an interested party aggrieved by such rule or order, by filing a request for such review with the Land and Water Adjudicatory Commission and serving a copy on the water management district. Such request for review is not a precondition to the effectiveness of such rule or order, or to the seeking of judicial review as provided by ss. 373.133 and 120.68.

373.219 Permits required.—

(1) The governing board or the department may require such permits for consumptive use of water and may impose such reasonable conditions as are necessary to assure that such use is consistent with the overall objectives of the district or department and is not harmful to the water resources of the area. However, no permit shall be required for domestic consumption of water by individual users.

(2) In the event that any person shall file a complaint with the governing board or the department that any other person is making a diversion, withdrawal, impoundment, or consumptive use of water not expressly exempted under the provisions of this chapter and without a permit to do so, the governing board or the department shall cause an investigation to be made, and if the facts stated in the complaint are verified the governing board or the department shall order the discontinuance of the use.

373.226 Existing uses.—

(1) All existing uses of water, unless otherwise exempted from regulation by the provisions of this chapter, may be con-

tinued after adoption of this permit system only with a permit issued as provided herein.

(2) The governing board or the department shall issue an initial permit for the continuation of all uses in existence before the effective date of implementation of this part if the existing use is a reasonable beneficial use as defined in s. 373.019(5) and is allowable under the common law of this state.

(3) Application for permit under the provisions of subsection (2) must be made within a period of 2 years from the effective date of implementation of these regulations in an area. Failure to apply within this period shall create a conclusive presumption of abandonment of the use, and the user, if he desires to revive the use, must apply for a permit under the provisions of s. 373.229.

373.229 Application for permit.—

(1) All permit applications filed with the governing board or the department under this part and notice thereof required under s. 373.116 shall contain:

(a) The name of the applicant and his address or, in the case of a corporation, the address of its principal business office;

(b) The date of filing;

(c) The date set for a hearing, if any;

(d) The source of the water supply;

(e) The quantity of water applied for;

(f) The use to be made of the water and any limitation thereon;

(g) The place of use;

(h) The location of the well or print of diversion; and

(i) Such other information as the governing board or the department may deem necessary.

(2) The notice shall state that written objections to the

proposed permit may be filed with the governing board or the department by a specified date. The governing board or the department, at its discretion, may request further information from either applicant or objectors, and a reasonable time shall be allowed for such responses.

(3) If the proposed application is for less than 100,000 gallons per day, the governing board or the department may consider the application and any objections thereto without a hearing. If the proposed application is for 100,000 gallons per day or more and no objection is received, the governing board or the department, after proper investigation by its staff, may, at its discretion, approve the application without a hearing.

373.233 Competing applications.—

(1) If two or more applications which otherwise comply with the provisions of this part are pending for a quantity of water that is inadequate for both or all, or which for any other reason are in conflict, the governing board or the department shall have the right to approve or modify the application which best serves the public interest.

(2) In the event that two or more competing applications qualify equally under the provisions of subsection (1), the governing board or the department shall give preference to a renewal application over an initial application.